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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-927

GROS VENTRE TRIBE OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Gros Ventre Tribe prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for

the Ninth Circuit entered in this case on July 18, 1978.

## OPINIONS BELOW

The opinion of the Court of Appeals, reported at 581 F.2d 1314, appears in the appendix at page A-1. The opinion of the District Court for the District of Montana is unreported and appears in the appendix at page B-1.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1978, and a copy is reproduced in this petition at page C-1. A timely petition for rehearing with suggestion for rehearing in banc was denied on September 13, 1978, and a copy of the order is reproduced in the appendix at page D-1. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).



## QUESTIONS PRESENTED

An Indian Tribe obtained a judgment against the United States for compensation for its reservation. Congress appropriated funds to pay the judgment, which were subsequently held in trust for the Tribe. Later Congress enacted a statute which provided for distributing part of the trust fund to persons who were not members of the Tribe, despite the protest of the Tribe. The Tribe obtained a preliminary order in U. S. District Court prohibiting any distribution. The non-members thereupon brought a separate action--the present action--in U.S. District Court against only the government, which had already agreed with them and which then stipulated that summary judgment could be entered as agreed. The Tribe received notice and objected unsuccessfully to the stipulated summary judgment. The Court of Appeals affirmed.

1. Does the Tribe have a property interest in the fund which is protected by the Fifth Amendment?

2. Does the proposed distribution to non-members deprive the Tribe of its property without compensation and without due process of law?

3. Was there a case or controversy between the parties to this action?

4. If not, was the jurisdictional defect cured by the Tribe's appearance later to object to summary judgment?

5. Should this Court exercise its supervisory powers over the lower court in light of the irregular procedure for bringing in the adverse party whose rights were to be affected by the stipulated judgment?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:



> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

25 U.S.C §1262

> ". . . The sum of $2,100,000 from the funds credited to the Gros Ventre Tribe under section 1261 of this title shall be distributed per capita to all members of the Fort Belknap Community who were born on or prior to and are living on March 18, 1972, and (a) whose names appear on the February 5, 1937, payment roll of the Gros Ventre Tribe of the Fort Belknap Reservation, or (b) who are descended from a person whose name appears on said roll, if such member possesses a greater degree of Gros Ventre blood than Assiniboine blood. If such member possesses equal quantums of Gros Ventre and Assiniboine blood he may elect to participate in the per capita distribution authorized by this section, in which event he shall not be eligible to participate in any per capita distribution of an Assiniboine judgment. . ."

## STATEMENT OF THE CASE

As a result of an 1855 treaty with the United States, the Gros Ventre Tribe and the related Blackfeet Tribe once had

a reservation covering much of Montana. In 1888 the United States took most of it for 24-1/2 cents per acre. The Gros Ventre Tribe now lives on a reduced reservation in Montana which it shares with the Assiniboine, an unrelated tribe. (See Azure v. Morton, 514 F.2d 897 (9th Cir. 1975)).

The Gros Ventre and Blackfeet filed a claim against the United States before the Indian Claims Commission for taking the old reservation at a grossly inadequate price, inconsistent with the government's role as guardian and trustee of the tribes. Their claim was settled, and a judgment was entered in their favor on August 28, 1968. Congress appropriated funds to pay the judgment two months later. (82 Stat. 1190, 1198). The government, acting as trustee, deposited the money in various Montana banks or invested it in other forms.



(Ex. 7-10 of Ex. D (Capture Deposition)). The Bureau of Indian Affairs identified the funds as the "Blackfeet & Gros Ventre Trust Account", consulted with the tribes on investment questions, and periodically reported to them. (Id.)

Four years later Congress enacted a statute which divided the money 73.2 percent to the Blackfeet and 26.8 percent to the Gros Ventre. (25 U.S.C. §§1261, et seq.) Although the statute provided that the Blackfeet share was to be distributed per capita to members of that tribe, Congress rejected the request of the Gros Ventre representatives to limit the distribution of the Gros Ventre share to those with at least one-fourth Gros Ventre blood. Persons with less than one-fourth Gros Ventre blood are not and cannot be members of the Tribe, as distinguished from the Fort Belknap Community. (Ex. D (Capture

Deposition) pp. 14, 22-23, 29-30, 37-38, 45, 55-56; Cf. Pub. Res. 116, 49 Stat. 1569). Instead, the statute allowed per capita shares also to tribe members' descendants who, because their other parent had little or no Gros Ventre blood, were not themselves tribe members. (25 U.S.C. §1262). There are 178 such persons, known in this case as the "Adams group." Their combined share is $173,728, which will be used instead for tribal purposes if the Tribe prevails. (25 U.S.C. §1263; Azure Record 210).[1/]

An unrelated dispute involved Indians known as the "Azure group" who the government decided were ineligible to share. (See Azure v. Morton, 514 F.2d 897 (9th Cir. 1975)). The Azure group filed suit in the U.S. District Court in

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1/ The record in the Azure case was made a part of the record on appeal in this case.



Montana to compel the government to include them in the distribution. They also named the Tribe as a party defendant, but since the Tribe agreed with them it moved to be realigned as plaintiff.

Since the Secretary of the Interior also had already ruled that it would make distribution to the Adams group despite the Tribe's protest, the Tribe filed a cross-complaint against the government praying for an injunction against any distribution to the Adams group, and moved for a preliminary injunction to the same effect. The Adams group appeared by counsel to oppose the Tribe's request for a preliminary injunction. The District Court issued an order which formally denied the request for a preliminary injunction but granted it in effect, that it ordered that no distribution

could be made without leave of court. (Azure Record 96-97).

With respect to the Adams group, the Tribe and the government thereafter were the adversaries in the Azure case. The government defended the claim of the Adams group, and stated in its Answer to the Tribe's cross-complaint:

> "The defendant, the United States of America has determined that it is not necessary to have one-quarter degree Gros Ventre blood in order to share in the distribution of the Gros Ventre judgment fund." (Azure Record 128).

Judge Murray granted summary judgment in favor of the Tribe. (Azure Record 311). The government appealed, the Adams group appeared as amicus curiae, and the Court of Appeals for the Ninth Circuit reversed with respect to the Adams group on the ground they had not been made parties to the suit. Azure v. Morton, 514 F.2d at 900-901.

In the meantime, however, the Adams



group had begun this case. After the District Court in the Azure case had ordered no further distribution without leave of court, they filed a complaint in a different division of the same court naming only the United States and its officials as defendants. They did not make their adversary, the Tribe, a party. They claimed the District Court had jurisdiction under 28 U.S.C. §1361 (mandamus).

The government first defaulted, then stipulated with the Adams group to set aside the default, and answered admitting all the essential elements of the complaint. (Record 10, 14, 17). The answer stated:

> ". . . These defendants [the United States, the Secretary of the Interior, and the Bureau of Indian Affairs Area Director] state that they stand ready and willing to make the per capita payments claimed by the plaintiffs; allege that they are prohibited from doing so by this court's Order . . . in [the Azure case]." (Record 15)

The plaintiff Adams group and defendant government then agreed upon stipulated facts upon which the court could enter judgment for plaintiff. They stipulated that plaintiffs were legally entitled to share, that the government's decision to that effect before the complaint was filed was proper, and that only the government's obedience to the court's preliminary order in the Azure case prevented a distribution to them. (Record 38). The government signed this stipulation five days after it had approved the form of Judge Murray's final order to the contrary with respect to the Adams group in the Azure case. (Azure Record 313; Record 39).

Nothing more happened in this case until after the Ninth Circuit reversed the holding in the Azure case with respect to the Adams group. Twenty



days later, the Adams group moved for summary judgment based on the stipulation between them and the government. The District Court ordered that notice of the case and the proposed summary judgment be served upon counsel for the Tribe. At the hearing on the stipulated motion, Judge Battin overruled the Tribe's objections and granted summary judgment.

The Tribe appealed to the Ninth Circuit, arguing there was no case or controversy between the original parties to the case, and that the distribution unconstitutionally deprived it of its property. The government and the Adams group both argued in support of the result below.

The Court of Appeals affirmed. On the jurisdictional question, it held that there was a dispute to be resolved, that the fact that the plaintiffs and

defendants agreed on that dispute did not affect the power of the Court to decide otherwise, and that the government refused to distribute any money until all claims were fully adjudicated by the courts.[2/] App. A13-15. Alternatively, it held that the Tribe had become an intervenor when it objected to the summary judgment, that a controversy arose then, and (by implication) it was not necessary that the controversy have existed from the beginning of the case. App. A10-12, 15.

On the merits, the Court held that the proper construction of the distribution statute made the Adams group eligible. It seems to have held that Congress somehow had declared the Adams

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2/ What the goverment actually said, in its answer and stipulation, was that it was ready and willing to pay plaintiffs but was prohibited from doing so by the court's order in the Azure case. (Record 15, 38).



group members of the Tribe. App. A-19. With respect to the Tribe's principal argument that such a distribution of its judgment fund to non-members against its will violated its Fifth Amendment property rights, the Court of Appeals said only that the Tribe's claim to a property interest in the fund was "meritless". App. A-21.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT UPON THE QUESTION, WHETHER A CASE OR CONTROVERSY EXISTS WHEN ALL PARTIES WANT THE SAME RESULT.

The plaintiff Adams group and the defendant government were never adversaries. Before the Adams group filed their complaint, the government had announced it decided they were entitled to share. After it was filed, the government admitted their complaint, admitted all their requests for admission, stipulated they were entitled to

the money but were prevented by court order from distributing it, and stipulated that summary judgment could be entered. At the same time, the government fought for their common position against the Tribe in the Azure case. The government and the Adams group continue to argue on the same side of this case.

This Court has held there is no jurisdiction in the District Court if there is no case or controversy between the parties. It has characterized a proceeding in which there was no conflict of interest between plaintiff and defendant and which was brought to affect the rights of a third person not before the court as a "contempt of the Court, and highly reprehensible." Lord v. Veazie, 8 How. (49 U.S.) 250, 255, 12 L.Ed. 1067, 1069 (1850). More recently, this Court decided a case which



is factually indistinguishable. Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47, 28 L.Ed.2d 590, 91 S.Ct. 1292 (1971). In a prior action, the U.S. District Court had ordered a reluctant Board of Education to bus students. Moore then brought a separate action against the Board to prevent it from busing students and from obeying the order, based on an anti-busing statute. The case was consolidated with another in which the parties were adverse. On appeal, both the plaintiff Moore and the defendant Board argued the validity of the anti-busing statute and urged this Court to set aside the busing order. This Court observed that both litigants wanted the same result, and held there was no case or controversy and therefore no jurisdiction. Id., 402 U.S. at 47-48, 91 S.Ct. at 1293, 28 L.Ed.2d at 591.

The Court of Appeals held, absolutely contrary to Moore, that it did not matter that plaintiffs and defendants were in agreement, since the court itself had the power to disagree with both. App. A-14. It held that a dispute existed with someone, that it therefore was necessary to have an adjudication of that dispute, and that it wasn't necessary that the parties in the case include someone who was on the opposite side of the dispute. The Tribe respectfully suggests the Court of Appeals committed plain error. The Tribe cited this Court's precedents to the Court of Appeals which dismissed them as "inapposite". This Court should grant certiorari to enforce obedience to its decisions and to thwart the risk of collusive litigation which now exists in the Ninth Circuit as a result of the opinion below.



2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEAL UPON THE QUESTION, WHETHER SUBJECT MATTER JURISDICTION MUST EXIST AT THE COMMENCEMENT OF THE ACTION.

The Court of Appeals held, in the alternative, that even if the District Court did not have jurisdiction over the case as originally brought, a controversy arose when the Tribe as an adverse party entered the case to object to the proposed summary judgment.

This Court has generally held that the existence of subject matter jurisdiction is to be determined as of the time the action is commenced. Lack of diversity is not cured even if one of the parties later moves to a different state. Anderson v. Watt, 138 U.S. 694, 34 L.2d 1078, 11 S. Ct. 449 (1891). When a defendant removes from state court a case which could only have been brought in federal court, the defect is not cured by

the circumstance that it is removed to the court where it could have been brought. Venner v. Michigan Cen. R. Co., 271 U.S. 127, 70 L.Ed. 868, 46 S. Ct. 444 (1926); Lambert Run Coal Co. v. Baltimore & Ohio R. Co., 258 U.S. 377, 66 L.Ed. 671, 42 S. Ct. 349 (1922).

This Court has also held that when a suit was prematurely brought, intervention at a time when the suit could have been properly brought could not cure the vice in the original suit. U.S. ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157, 58 L.Ed. 893, 34 S. Ct. 550 (1914). Several other Courts of Appeal have held that intervention does not cure a jurisdictional defect. Fuller v. Volk, 351 F.2d 323, 328 (3d Cir. 1965); Pianta v. H. M. Reich Co., Inc., 77 F.2d 888, 890 (2nd Cir. 1935); Kendrick v. Kendrick, 16 F.2d 744, 745 (5th Cir.), cert. denied, 273 U.S. 758, 71 L.Ed. 877, 47 S. Ct. 472 (1927).



3. THE DECISION BELOW COUNTENANCES SUCH A GRAVE DEPARTURE FROM ORDERLY PROCEDURE THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER OVER THE LOWER COURTS.

The Federal Rules of Civil Procedure contemplate that a party whose rights are to be determined by a District Court shall be served with a summons and complaint and shall be allowed an opportunity to answer and participate in the case. In this case, however, the Tribe was brought in through a notice mailed to counsel for the Tribe, stating that summary judgment had been proposed and no objections would be heard if not made then. (Record 46-49). The risk that the fund might otherwise be lost compelled the Tribe to appear in this unusual proceeding. The Tribe was at a procedural and psychological disadvantage before Judge Battin in that it was cast as an outsider attempting to thwart an agreed settlement of a two-year old case.

The procedure below prejudiced the right of the Tribe to develop the record and its arguments in an orderly manner. This Court should grant certiorari to prevent the spread of this tactic by parties who collude to prejudice the rights of another.

4. THE COURT BELOW WRONGLY DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IN HOLDING THAT AN INDIAN TRIBE HAS NO PROTECTED PROPERTY RIGHT IN TRUST FUNDS WHICH ARE PROCEEDS OF A JUDGMENT IN ITS FAVOR FOR COMPENSATION FOR ITS LAND TAKEN BY THE UNITED STATES.

The decision below is the first case in history where a United States court has sanctioned the government's disposition of tribal property to non-tribe members over the opposition of the Tribe. This case presents a conflict between the power of the United States over Indian tribal property as trustee of the tribes and the rights of those tribes



as beneficiaries of the trust to prevent the government from dissipating their property.

The Court of Appeals did not explain its statement that the Tribe had no property interest in the fund. The Tribe obviously had a property interest in the old reservation from which the fund derives. The government designated it as the "Blackfeet and Gros Ventre Trust Fund" and consulted Tribal authorities on investment questions.

In the posture of this case, it must be taken as given that the Adams group are not Tribe members, since the case was decided by summary judgment. Furthermore, the Adams group did not even claim to be Tribe members, nor did the statute purport to limit distribution to Tribe members, as contrasted with the provisions for the Blackfeet distribution.

This Court has suggested that the government's power to determine the membership of tribes has constitutional limits when it affects the power to dispose of tribal property. Red Bird v. United States (Cherokee Intermarriage Cases) 203 U.S. 76, 89, 51 L.Ed. 96, 102, 27 S. Ct. 29, 34 (1906). This Court also has held that a Tribe's property rights are protected from being taken by the government, even for the purpose of sharing them with another tribe. Chippewa Indians of Minnesota v. United States, 301 U.S 358, 81 L.Ed. 1156, 57 S.Ct. 826 (1937); Shoshone Tribe v. United States, 299 U.S. 476, 81 L.Ed. 360, 57 S.Ct. 244 (1937).

In view of the number of Indian tribes and the amount and variety of their property which is subject to the government's trusteeship, this Court should grant certiorari to clarify

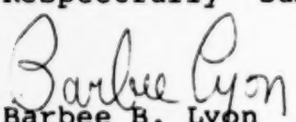


the extent of that power to use the property against the interests of the tribes.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,



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APPENDIX A

A-1

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

| | | |
|---|---|---|
| CLARENCE ADAMS, NELLIE B. MARTIN, JAMES RICHARD SWANSON, and DONITA ADAMS NORDLUND, on behalf of themselves and all others similarly situated, | ) | |
| Plaintiffs-Appellees, | ) | No. 35-3577 |
| v. | ) | OPINION |
| ROGERS MORTON, Secretary of Interior, JAMES F. CANAN, Area Director, Bureau of Indian Affairs, ROD SCURLOCK, and the UNITED STATES OF AMERICA, | ) | |
| Defendant-Appellee. | ) | |
| GROS VENTRE TRIBE OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA. | ) | |
| Appellant. | ) | |

Appeal from the United States District Court

District of Montana

Before: CHAMBERS, KILKENNY and TANG, Circuit Judges.

KILKENNY, Circuit Judge:

This is an appeal by the Gros Ventre Tribe of the Fort Belknap Indian Reservation, Montana [appellant]*, from an adverse judgment in connection with funds appropriated by Congress for distribution to members of the Tribe. Appellant challenges the right of those known to the record as the "Adams Group" to participate in the Congressional allotment. We affirm.

PREVIOUS LITIGATION

An examination of the background to this litigation is essential to a proper understanding of the procedural problems presented by this appeal. In 1968, pursuant to a judgment awarded by the Indian Claims Commission, Congress appropriated 2.1 million dollars for the Gros Ventre Tribe in settlement of disputed tribal land conveyances. The appropriations measure contained specific

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* Sometimes referred to as Tribe.



statutory language designating the recipients.

Two groups, the Azure Group and the Adams Group, appellees, over strong opposition, sought to participate in the distribution. The Secretary of the Interior [Secretary] argued that the Azure Group was ineligible while the appellant Tribe contended that the Adams Group should not share. In July, 1972, the Azure Group sued in district court [Butte Division] seeking to reverse the Secretary's decision that they would receive no part of the settlement fund. In August, 1972, the district judge entered an order enjoining the Secretary from distributing any of the Congressional funds until the Azure Group had been given ten days notice. In March of 1973, appellant filed two motions with the court: the first to

realign itself as a party plaintiff with the Azure Group in their litigation because it supported the Azure claim; and the second to enjoin permanently the Secretary from distributing funds to members of the Adams Group. After arguments on these matters on April 10, 1973, the Adams Group being represented, the district judge granted the motion to realign, but refused to enjoin permanently distribution to the Adams Group. However, this order continued the August, 1972, injunction with the minor modification that no funds could be distributed without leave of the court.

Shortly after this order was issued, the Adams Group filed suit against the Secretary in district court [Billings Division], seeking injunctive and declaratory relief requiring the Secretary to remit a sahre of the fund to them.



The Secretary answered on August 2, 1973, claiming that the injunction in the Azure case prohibited him from making any payments to the Adams Group.

In February of 1974, while the Adams Group's suit was in the preliminary stages, the district judge granted the Azure Group's motion for summary judgment in its suit. In the same order, the district judge rejected any claims that the appellee Adams Group might have to recover any share of the fund. While the Azure case was awaiting appeal to this court, action on the Adams Group's suit continued. On March 20, 1974, a stipulation was filed between the Adams Group and the Secretary agreeing that the Adams Group was entitled to a part of the distribution, but that it was prohibited by the April 10, 1973, injunction from participating.

Once again the focus shifted back to the Azure suit. In November of 1974, because of the similarity of issues before the Ninth Circuit in Azure and its own case in the district court, the Adams Group filed an amicus brief in Azure. On April 15, 1975, this court affirmed the summary judgment in favor of the Azure Group, but the segment of the district court order denying any allotment to the appellee Adams Group was reversed. Azure v. Morton, 514 F.2d 897, 900-01 (CA9 1975).1/

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1/ "Inasmuch as the district court was faced only with determining the rights of the Azure Group plaintiffs, we reverse that part of the order which addressed and collaterally determined the ineligibility of another 178 Indians, the Adams Group, to participate in the Gros Ventre judgment. Although they are members of the Fort Belknap Community, they do not possess the one-quarter degree Gros Ventre blood quantum requisite to participating



membership in the Tribe. Because of this deficiency, the district court precluded their participation in the Gros Ventre award.

"We express no opinion on the merits of this unexpressed eligibility requirement appended by the district court to the language of the distribution statute. We conclude only that it was unnecessary to meet the issue in determining the rights of the Azure Group. All in the Azure Group were members of the Fort Belknap Community. All were listed on the 1937 Gros Ventre payment roll as required by subsection (a). Having determined that the Azure Group is qualified to share in the Gros Ventre judgment, it would be improper for us to rule on a requirement not at issue here involving a group of plaintiffs who are not parties to this suit. Their eligibility to participate in the Gros Ventre judgment is being asserted in a separate action. The propriety of implying in the distribution statute a tribal blood quantum-membership requirement can be more properly presented in that proceeding." 514 F.2d at 900-01. [Emphasis supplied].

After Azure was decided, the Adams Group moved for summary judgment in its case. Language in their June 3, 1975, motion made it explicitly clear that representatives of appellant should appear to preserve their right to contest any award to the Adams Group. On June 11, 1975, the district judge issued an order setting a hearing on the motion for summary judgment which included the following language:

> "It is further ordered that any legally constituted and authorized representative of the Gros Ventre tribe may, on or before July 7, 1975, file in this matter objections, with grounds therefor, to the granting of a motion for summary judgment.
>
> "If the objections, with grounds therefor, are not filed . . . they will not thereafter be heard."

Appellant filed a ten page objection, including authorities, setting out the same substantive arguments that it makes here. At the close of the hearing



appellant's counsel asked the district judge if there was anything necessary from a technical standpoint to perfect his client's participation as a party in the case, indicating that his party would file, if necessary, an intervention motion. The judge responded:

> "It would be the Court's opinion, because I did direct notice be given to the various individuals, to give them an opportunity to come forward and make any objections they had to the motion, that those who have appeared and objected to the motion, of course, will be considered as part of the Court's determination whether or not their objections were valid."

On September 23, 1975, the district judge filed his memorandum and order granting summary judgment for the Adams Group. The "Gros Ventre Tribe of the Fort Belknap Indian Reservation, Montana," filed a notice of appeal from this judgment on October 31, 1975.

That the district court recognized appellant as a party to the Adams litigation is made manifest by its final judgment in which it passed upon and rejected, as a matter of law, the appellant's claims.

I.

Appellant's contention challenging the jurisdiction over it of the district and this court is meritless. The Tribe places itself in the anomalous position of arguing that it was not a party to the litigation below, while at the same time claiming a right to appeal from the judgment. A thorough analysis of Rule 3, FRAP, shows that only a party or someone privy to the record is entitled to appeal. If the appellant had sought and the court had denied a formal motion to intervene, we would have had jurisdiction to consider the propriety of the denial



of that motion. Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 504 (CA3 1976), cert. denied 426 U.S. 921. However, the appellant never presented the court with a formal motion to intervene, but instead filed objections to appellees' summary judgment motion. The court properly viewed appellant's objections as a formal entry into the case, and decided the merits of the motion as if appellant had participated in every stage of the proceedings. The horns of appellant's dilemma were presented to appellant's counsel on oral argument, and he conceded that his client should be treated as an intervenor. We add that the record in the district court totally supports the view that appellant was, in fact, an intervenor in that court. Because it fully participated in the summary judgment proceedings,

appellant will not now be heard to say that it was not privy to the record in the district court.

The rule which binds the Tribe both in the district court and on this appeal is succinctly stated in 1B Moore's Federal Practice, ¶0.411 [6], at 1552 (2d. ed. 1974), as follows:

> "If a non-party who thus participates in litigation has an interest sufficiently close to the matter in litigation, and had adequate opportunity to litigate in support of or in defense against the cause of action on which the suit is based, the policies underlying the doctrine of judicial finality require that the participating non-party should be bound by the resulting judgment to the same extent as though he were a party to the action."

Consequently, even though the Tribe could be viewed as a non-party to the action, nonetheless, it fully participated both in the trial court and in this court and must be bound by whatever judgment is rendered. Souffront v. Compagnie Des Sucreries, 217 U.S. 475, 486-87 (1910).



II.

We need not decide whether appellant was in law an indispensable party. Obviously, it was a proper party. As the Tribe named in the legislation, it had an interest in securing a proper construction of the legislation for the best interests of its members and all those entitled to the funds. Additionally, in our view of the record, appellant fully participated in the litigation and presented its contentions; whether its presence was indispensable or proper is now beside the point.

III.

Next, appellant alleges that there was no case or controversy between the original plaintiffs, the Adams Group, and defendant, the Secretary.

The basic question is whether the facts in controversy, under all of the circumstances, show that there is a

substantial issue between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a judgment. Steffel v. Thompson, 415 U.S. 452, 460 (1974); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 4 (CA9 1974), cert. denied 419 U.S. 1008.

Appellant's contention is belied by the record. The Secretary steadfastly refused to distribute any part of the appropriated fund until all claims were fully adjudicated by the courts. Beyond that, there was the necessity of an adjudication as to the right, if any, of the Adams Group to share in the distribution. The fact that the Secretary agrees with the appellees' statutory interpretation does not affect the power of the court to adjudicate otherwise.



Appellant's cases on collusive litigation are inapposite and have no bearing on the record before us.

In any event, a controversy arose when appellant filed its objections and participated in the summary judgment hearing.

IV.

Appellant's principal claim is that the members of the Adams Group fail to qualify as members of the Gros Ventre Tribe. Beyond that, it is argued that to be a member of the Gros Ventre Tribe within the purview of the Congressional settlement, one must meet the Tribe's historical one-fourth degree of blood quantum membership eligibility criterion.

The language of the statute which we are to construe, and which was construed in the Azure case, is clear. We quote, in part, as follows:

> "The sum of $2,100,000 from the funds credited to the Gros Ventre Tribe under section 1261 of this Title shall be distributed per capita to all members of the Fort Belknap Community who were born on or prior to and are living on March 18, 1972, and (a) whose names appear on the February 5, 1937, payment roll of the Gros Ventre Tribe of the Fort Belknap Reservation, or (b) who are descended from a person whose name appears on said roll, if such member possesses a greater degree of Gros Ventre blood than Assiniboine blood." [Emphasis supplied]. 25 U.S.C. §1262.

Manifestly, any person whose name appeared on the February 5, 1937, payment roll of the Gros Ventre Tribe of the Fort Belknap Indian Reservation, or who is descended from a person whose name appeared on said roll, and who meets the other requirement, is entitled to participation.

The allegations of the complaint gives a precise description of the status of the appellees, the Adams Group. The controlling paragraphs read:



> "III.
>
> Plaintiffs Clarence Adams and Nellie B. Martin are members of the Fort Belknap Community born prior to and living on the date of Public Law 92-254; 86 Stat. 64, . . . whose names appear on the February 5, 1937, payment roll of the Gros Ventre Tribe of the Fort Belknap Reservation, citizens of the United States, and residents of Montana; all other plaintiffs whom they represent reside variously within and without the State of Montana.
>
> "IV.
>
> Plaintiffs James Richard Swanson and Donita Adams Nordlund are members of the Fort Belknap Community born prior to and living on date of Public Law 92-254; 86 Stat. 64 who are descended from persons whose names appear on said February 5, 1937 payment roll and who possess a greater degree of Gros Ventre blood than Assiniboine blood, are citizens of the United States and residents of Montana; all other plaintiffs whom they represent reside variously within and without the State of Montana."

The appellant does not dispute these allegations. To the contrary, it concedes the truth of these statements, but then goes on to say tht [sic]

appellees failed to allege that they were "in fact members of the Gros Ventre Tribe."

We are governed by the uniform rule of construction that the legislative will must be ascertained from the text of the statute if the words are clear and plain and the whole enactment internally cohesive. Fisher Flouring Mills Co. v. United States, 270 F.2d 27, 30 (CA9 1958). In other words, a court interpreting a statute may not depart from its clear meaning. United States v. Sullivan, 332 U.S. 689, 693 (1948), and where the statute plainly expresses the will of Congress in language that does not permit or require a strained interpretation, words thereof may not be extended or distorted beyond their plain popular meaning. Summer v. Victor Chemical Works, 298 F.2d 66, 68 (CA9 1961); Lindstrom v. Commissioner, 149



F.2d 344, 346 (CA9 1945). The court's first duty in construing the statute is to effectuate the express intent of the Congress. Richmond Welfare Rights Organization v. Snodgrass, 525 F.2d 197, 202 (CA9 1975).

Here, the appellant would have us read the statute not only that members of the Gros Ventre Tribe are eligible for participation and distribution, but that the member must meet the Tribe's historical one-fourth degree blood quantum membership eligibility criterion. We agree with the lower court and with what is said by our colleagues in Azure that there is absolutely no language in the statute which permits such a construction.

True enough, unless limited by treaty or statute, a Tribe has the power to determine tribal membership. Cherokee Intermarriage Cases, 203 U.S. 76 (1906);

Roff v. Burney, 168 U.S. 218, 222-23 (1897). Here, however, the Congress in precise language has specifically named the fund's beneficiaries. In the recent case of United States v. Wheeler, ____ U.S. ____ (March 22, 1978), the Court, in commenting on the unique character of the sovereignty of Indian Tribes, said: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." [Emphasis supplied.] Cf. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 656 (1976).

To follow the appellant's suggestion, we would be compelled to read into the statute language which is missing entirely. This is not our function. Because the language of the statute is clear and unequivocal, there is no need for the invocation of aids to



construction. The appellees', Adams Group, claim places it squarely within the provisions of subsections (a) and (b) of the controlling legislation.

V.

The other contentions of the appellant, including: (1) lack of compliance with the Federal Rules of Civil Procedure, and (2) that the funds appropriated by Congress actually belonged to the Gros Ventre Tribe, are meritless. The numerous authorities cited by appellant have no application to the record before us.

CONCLUSION

The judgment of the lower court must be affirmed.

SO BE IT.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

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| | | |
|---|---|---|
| CLARENCE ADAMS, NELLIE B. MARTIN, JAMES RICHARD SWANSON and DONITA ADAMS NORDLUND, on behalf of themselves and all others similarly situated, | ) | |
| Plaintiffs, | ) | Civil No. 1163 |
| vs. | ) | MEMORANDUM AND ORDER |
| ROGERS MORTON, Secretary of Interior, JAMES F. CANAN, Area Director, Bureau of Indian Affairs, ROD SCURLOCK, and the UNITED STATES OF AMERICA, | ) | |
| Defendants. | ) | |

---

Presently pending in this action is a motion for summary judgment.

This case evolves out of an Act of March 18, 1972 (Public Law 92-254; 86 Stat. 64), in which the Congress of the United States provided funds to pay judgments to the Gros Ventre Tribe. The

specific language of the Act is as follows:

> "The sum of $2,100,000 from the funds credited to the Gros Ventre Tribe under Section 1 of this Act shall be contributed per capita to all members of the Fort Belknap Community who were born on or prior to and are living on the date of this Act and (a) whose names appear on the February 5, 1937 payment roll of the Gros Ventre Tribe of the Fort Belknap Reservation, or (b) who are descended from a person whose name appears on said roll, if such member possesses a greater degree of Gros Ventre blood than Assiniboine blood."

Therefore, any person who is a member of the Fort Belknap Community and who meets the requirements stated in the above section is entitled to a per capita share of the $2,100,000. The language could not be any clearer. It specifically states the qualifications required.

A reading of the complaint provides a clear description of the plaintiffs:

> "(3) Plaintiffs Clarence Adams and Nellie B. Martin are members of the Fort Belknap Community born prior to and living on the date of Public Law 92-254; 86 Stat. 64, copy attached as Exhibit A and a part hereof by reference, whose names appear on the February 5, 1937, payment roll of the Gros Ventre Tribe of the Fort Belknap Reservation, citizens of the United States, and residents of Montana; all other plaintiffs whom they represent reside variously within and without the State of Montana.
>
> "(4) Plaintiffs James Richard Swanson and Donita Adams Nordlund are members of the Fort Belknap Community born prior to and living on the date of Public Law 92-254; 86 Stat. 64, who are descended from persons whose names appear on said February 5, 1937, payment roll and who possess a greater degree of Gros Ventre blood than Assiniboine blood, are citizens of the United States and citizens of Montana; all other plaintiffs whom they represent reside variously within and without the State of Montana."



From this description there is no question that they meet all requirements specifically and clearly set forth in the Act. A plain, simple reading of the Act permits no other conclusion.

The Gros Ventre Tribe contends that the plaintiffs fail to allege in their

complaint that the plaintiffs are in fact members of the Gros Ventre Tribe. Further, it is contended that to be a member of the Gros Ventre Tribe, one must meet the Tribe's historical one-fourth degree blood quantum membership eligibility criterion. There is absolutely nothing in the Act which refers to one-fourth blood quantum. The Tribe is asking the Court to write an additional requirement into the Act; that is a function of Congress, not of the Court.

The Court also finds that the plaintiffs' attorney Chan Ettien, is entitled to the attorney's fees demanded. Without Mr. Ettien's diligent pursuit and labor, the plaintiffs in this action would be without the funds to which they are clearly entitled. Since Mr. Ettien made the funds available, he should be compensated for his efforts.



For the foregoing reasons, summary judgment is GRANTED in favor of the plaintiffs. The Clerk is directed to enter judgment accordingly.

Done and dated this 23rd day of September, 1975.

C-1

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Notice of Entry of Judgment

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry of judgment.

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

| | | |
|---|---|---|
| CLARENCE ADAMS, NELLIE B. MARTIN, JAMES RICHARD SWANSON, and DONITA ADAMS NORDLUND, on behalf of themselves and all others similarly situated, | ) | |
| Plaintiffs-Appellees, | ) | No. 75-3577 |
| vs. | ) | ORDER |
| ROGERS MORTON, Secretary of Interior, JAMES F. CANAN, Area Director, Bureau of Indian Affairs, ROD SCURLOCK, and the UNITED STATES OF AMERICA, | ) | |
| Defendant-Appellee. | ) | |
| GROS VENTRE TRIBE OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, | ) | |
| Appellant. | ) | |

Appeal from the United States District Court

District of Montana

Before: CHAMBERS, KILKENNY and TANG, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

No. 78-827

FILED
MAR 1 1979
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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GROS VENTRE TRIBE OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

WADE H. McCREE, JR.,
*Solicitor General*

JAMES W. MOORMAN,
*Assistant Attorney General*

EDWARD SHAWAKER
MARYANN WALSH,
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-927

GROS VENTRE TRIBE OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-21) is reported at 581 F.2d 1314.

### JURISDICTION

The judgment of the court of appeals was entered on July 18, 1978. A petition for rehearing and rehearing en banc was denied on September 13, 1978.

The petition for a writ of certiorari was filed on December 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a case or controversy was presented by this dispute over allocation of funds appropriated by Congress to pay an Indian Claims Commission judgment, and whether Congress acted within its constitutional power in setting the eligibility requirements it did for participation in the distribution.

## STATUTE INVOLVED

The distribution statute of March 18, 1972, Pub. L. No. 92-254, 86 Stat. 64, 25 U.S.C. 1262, provides in pertinent part:

> The sum of $2,100,000 from the funds credited to the Gros Ventre Tribe under section 1 of this Act shall be distributed per capita to all members of the Fort Belknap Community who were born on or prior to and are living on the date of this Act and (a) whose names appear on the February 5, 1937, payment roll of the Gros Ventre Tribe of the Fort Belknap Reservation, or (b) who are descended from a person whose name appears on said roll, if such member possesses a greater degree of Gros Ventre blood than Assiniboine blood.

## STATEMENT

In August 1968, the Indian Claims Commission entered a judgment for more than $8 million in favor of the Blackfeet and Gros Ventre Tribes (19 Ind. Cl. Comm. 363). Congress subsequently appropriated funds to pay the judgment (Pub. L. No. 90-608, 82 Stat. 1190, 1198), and enacted a statute providing for *per capita* distribution and identifying the persons to whom the distribution should be made. Pub. L. No. 92-254, 86 Stat. 64, 25 U.S.C. 1262. The recipients were identified as all members of the Fort Belknap Community, living on the date of the Act, whose names appeared on the 1937 tribal payment roll or who were descended from persons whose names appeared on that roll, so long as such member possessed a greater degree of Gros Ventre blood than Assiniboine blood.



Two lawsuits have arisen concerning the eligibility of competing groups of Indians to participate in the fund. We rely on the court of appeals' chronicle of the first suit (Pet. App. A-2 to A-7), which resulted in a court of appeals decision (514 F.2d 897) affirming the district court's ruling in favor of the "Azure Group" of claimants but reversing, as not properly part of the case, the district court's order denying any allotment to the "Adams Group." The present litigation, the second suit, was brought by the Adams plaintiffs against the Secretary of the Interior and others to require the Secretary to allow plaintiffs to participate in the fund and to recover reasonable attorneys' fees. The defendants conceded plaintiffs' right to recover from the fund but contested the issue of attorney fees. Before entertaining a motion for summary judgment, the district court ordered that petitioner, a tribe some of whose members may be eligible participants in the fund, be notified and given

an opportunity to be heard on objections to the participation of the Adams group. Petitioner was notified and filed a ten-page objection and brief and appeared by counsel at the hearing on summary judgment. Petitioner contended that the statute requires that beneficiaries meet the Gros Ventre blood requirement for tribal membership (one-fourth Gros Ventre blood) and that the complaint was insufficient because it failed to allege that plaintiffs met this requirement. At the hearing, petitioner's counsel stated that petitioner wished to intervene and asked the court whether any further steps were necessary to perfect petitioner's participation as a party to the litigation. The court's response advised that nothing further was required and suggested that the court was already treating petitioner as a party (Pet. App. A-8 to A-9). The court, after argument, overruled petitioner's objection, held that the statute imposed no such blood requirement, and held that plaintiffs were entitled to participate in the fund in view of their uncontested allegations that they met the eligibility requirements expressly stated by the statute (Pet. App. B-1 to B-5).

Affirming, the Ninth Circuit held that petitioner had fully participated in the proceeding and consequently was bound by the district court's judgment. The court held that even though the Secretary and the Adams group agreed on the interpretation of the distribution statute, an actual controversy existed because the Secretary refused to distribute the funds until all claims were adjudicated by the courts. The



court further held that petitioner's participation created a controversy ripe for judicial determination. On the principal issue of the Adams group's right to share in the distribution, the Ninth Circuit held that the words of the statute were plain, clearly expressed the intent of Congress, and did not require membership in the Gros Ventre Tribe according to the one-quarter degree blood quantum criterion. Therefore, the Adams claimants were all "squarely within" the provisions of the distribution statute.

## ARGUMENT

The decision of the court of appeals is correct and conflicts with no decision of any court of appeals or of this Court. The issues presented by petitioner do not warrant review by this Court.

1. Petitioner contends that this Court should grant review and order that all judgments below be vacated and the complaint dismissed because no case or controversy within the meaning of Article III ever existed between the Adams group and the defendants. Although the defendants did agree with the plaintiffs that the plaintiffs were entitled to participate in the fund, defendants disagreed with respect to other relief, such as the award of attorneys' fees (see Pet. App. B-4 to B-5). Thus, at the time of petitioner's intervention, a live controversy existed between the then parties to the suit.[1] Petitioner's

[1] The court of appeals properly concluded that petitioner had intervened in the district court proceedings (Pet. App. A-11 to A-12). *Roach* v. *Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972).

objection to the participation of the Adams group injected a new controversy regarding plaintiffs' eligibility to participate in the fund, even if it is assumed that no case or controversy had previously existed on that point. Petitioner actively litigated that controversy in the district court, in the court of appeals, and in this Court in its petition. Thus, a case or controversy has been present through all phases of this litigation. *Maryland Casualty Co.* v. *Pacific Co.*, 312 U.S. 270, 273 (1941); *Associated General Contractors of America, Inc.* v. *Laborers Int'l Union of North America*, 476 F.2d 1388, 1402-1403 (T.E.C.A. 1973). *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), relied on by petitioner, is distinguishable because there all of the parties were in total agreement, and no one intervened to create any disagreement regarding the relief sought by the plaintiff.

2. On the merits, petitioner no longer contends that the distribution statute requires that recipients meet the blood requirement for membership in the Gros Ventre Tribe (Pet. 7, 22-25). Petitioner argues that it has a vested interest in the judgment of the Indian Claims Commission and that Congress may not deprive it of that interest by allowing non-tribal members to participate in the recovery.

Congress, however, has the power to establish and to alter the distributional scheme for a tribal judgment award. The award is not an asset of the tribe in which any present tribal members have any vested property interest. *Delaware Tribal Business Comm.*



v. *Weeks*, 430 U.S. 73, 84 (1977); *United States* v. *Jim*, 409 U.S. 80, 82 (1972); *Winton* v. *Amos*, 255 U.S. 373, 391 (1921); *Cherokee Freedmen* v. *United States and the Cherokee Nation*, 195 Ct. Cl. 39, 48 (1971). The statute provides that persons who were on the Gros Ventre payment roll in 1937 and their descendents, who possess a greater degree of Gros Ventre blood than Assiniboine blood, may participate in the recovery so long as they are members of the Fort Belknap Community and were living on March 18, 1972. This distributional formula is a reasonable exercise of Congress's power to establish a distribution scheme for an Indian Claims Commission judgment.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JAMES W. MOORMAN
*Assistant Attorney General*

EDWARD SHAWAKER
MARYANN WALSH
*Attorneys*

FEBRUARY 1979

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

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No. 78-927

GROS VENTRE TRIBE OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

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# PETITIONER'S REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

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GROS VENTRE TRIBE OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA

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---

## PETITIONER'S REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Defendants concede they agreed with plaintiffs on the merits of this case. But, they say, they disagreed about plaintiffs' demand for attorneys' fees. This is the only controversy which they claim served as the jurisdictional basis for this case.

Defendants' argument can be summarized: if two parties can't litigate an issue by themselves because

there is no controversy between them about it, and if they disagree about whether one of them could get attorneys' fees for litigating it if only they could litigate it, then they can litigate it.

This is a sublimely pure form of bootstrap argument. It is a gross error which deserves summary reversal. It is a dangerous error which should prompt this Court to grant certiorari, since it swallows whole the Article III limitation on jurisdiction to actual cases and controversies. There is no sham or collusive litigation which would not be saved by registering in the pleadings a formal disagreement about attorneys' fees.

The "disagreement" about attorneys' fees is not even genuine in this case. There was no colorable authority for plaintiffs' demand that the government should pay their attorneys' fees, and they abandoned it in their stipulated agreement with defendants.

The Solicitor General's response on the merits misstates the issue. Petitioner agrees with him that tribal



members have no vested property interest in the judgment. But petitioner is not a tribal member: petitioner is the Tribe, and the property is Tribal property, petitioner's property. This Court articulated that distinction, and the existence of the Tribe's property right, in the principal case on which respondents rely. It held that funds "appropriated to pay an award redressing the breach of a treaty with a tribal entity" were "tribal property". Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85 (1977). The Court of Appeals' holding that the Tribe had no property interest in such a fund is directly contrary to this Court's opinion. The Tribe's plea that the government should not be allowed to pay that fund to nonmembers of the Tribe deserves the attention of this Court.

Respectfully submitted,

Don H. Marmaduke

Barbee B. Lyon
Of Attorneys for
Petitioner